No. 09-720

SUPREME COURT, U.S.
FILED
JAN 18

In The Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

RESPONDENT GRIFFIN WHEEL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the California Court of Appeal, following overwhelming authority from around the country applying this Court's decision in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), correctly affirm the trial court's grant of summary judgment in favor of Respondent based on the field preemptive effect of the Locomotive Boiler Inspection Act, 49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* and the Safety Appliance Act, 49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.*?

DISCLOSURE STATEMENT PER RULE 29.6

Respondent, Griffin Wheel Company operated as a division of Amsted Industries Incorporated, a privately held Delaware corporation, until October 1, 2008. On that date, Griffin Wheel Company was merged into Amsted Rail Company, Inc., a Delaware corporation, which is a wholly owned subsidiary of Amsted Industries Incorporated. No publicly held company owns 10% or more of stock in either Griffin Wheel Company, Amsted Rail Company, Inc., or Amsted Industries Incorporated.

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JURISDICTION

Petitioners have not cited any proper basis for jurisdiction to review the California Court of Appeal's decision. This case was disposed of properly and pursuant to this Court's long-standing jurisprudence on the field preemptive effect of the Locomotive Boiler Inspection Act, 49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* (the "BIA") and the Safety Appliance Act, 49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.* (the "SAA"). Therefore, this case does not invoke any of the bases for jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Statement of the Case submitted by Petitioners contains misstatements of fact and law that are addressed more fully in the body of this brief. What follows is a concise statement of facts material to consideration of the question presented, pursuant to Sup. Ct. Rule 14.1(g).

Decedent Alva Ransford was employed in the railroad industry from 1950 to 1989 during which time he worked on locomotives and as a supervisor in the locomotive diesel shops and around persons who were working on railcar brake shoes. *See*, Appellants' Appendix on appeal (hereafter "AA") at 80-88.

Respondent, Griffin Wheel Company (incorrectly named in the caption as "Griffin Wheel Company,

Inc.," hereafter "GWC") sold and manufactured railroad brake shoes, which for a time contained a small percentage volume of encapsulated chrysotile asbestos during some of the years that Mr. Ransford worked within the railroad industry. AA at 112-113.

Petitioners filed their complaint in the California Superior Court, City and County of San Francisco, alleging numerous causes of action arising from Mr. Ransford's alleged mesothelioma from exposure to asbestos. GWC answered Petitioners' complaint, generally denying the allegations of the complaint and alleging a number of affirmative defenses including that the claims of the parties were barred by federal field preemption. GWC moved for summary judgment based upon the field preemptive effect of the BIA and SAA (AA at 35-51), and the trial court granted GWC's motion. *See*, Appendix attached to Petition (hereafter "App.") at 15-18.

Contrary to Petitioners' assertion, GWC did not "concede" that the express preemption provision at 49 U.S.C. § 20106 does not also preempt Petitioners' claims. *See*, Petition for Writ of Certiorari (hereafter "Pet.") at 8-9. Nor is it "undisputed" that no federal regulation covers the subject matter of Petitioners' claim – the make-up of train brake shoes. Pet. at 9, n.2. GWC simply did not seek summary judgment on express preemption grounds and only mentioned Section 20106 in order to distinguish its application from the field preemption analysis called for under the voluminous case law interpreting the BIA and SAA. AA at 50:9-26. The trial court granted summary

judgment in favor of GWC based on the federal field preemption under the BIA and SAA and did not decide whether Petitioners' claims were also preempted under the express preemption provision in Section 20106, as that issue was not raised by GWC below. App. at 15-18.

Petitioners appealed the grant of summary judgment and the California Court of Appeal affirmed the trial court's ruling and subsequently denied Petitioners' request for rehearing. App. at 1-14, 19. The Supreme Court of California then denied Petitioners' request for review. App. at 20. Petitioners now seek a writ of certiorari from this Court to review the California Court of Appeal's Opinion.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT

A. Brief History Of BIA And SAA Field Preemption

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386, 389 (Cal. 1999) (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)), *cert. denied*, 528 U.S. 1077 (2000). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including

rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore,* 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) – are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

Over 80 years ago, this Court established the field preemptive effect of the BIA by holding that it "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926). *Napier* further expressly held as follows:

> " . . . **[T]he Boiler Inspection Act, as we construe it, was intended to occupy the field.** The broad scope of the authority conferred upon the Commission[1] leads to

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[1] "Commission" refers to the Interstate Commerce Commission which at the time *Napier* was decided had the controlling authority over the railroads. That authority was transferred to the Department of Transportation in 1966 by the Department of Transportation Act. *See*, *Springston v. Consolidated Rail Corp.*,

(Continued on following page)

> that conclusion. Because the standard set by the Commission must prevail, **requirements by the States are precluded, however commendable or however different their purpose.**"

Napier, 272 U.S. at 613 (emphasis added). Likewise, this Court first established the field preemptive effect of the SAA nearly a century ago in *Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439 (1915), which holds as follows:

> "[T]he exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The States thereafter could not legislate so as to require greater or less or different equipment.
>
> * * *
>
> [I]t is sufficient here to say the Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject."

Southern Ry. Co., 236 U.S. at 446-47.

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130 F.3d 241, 244 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform to* the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposefully left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152-53 (9th Cir. 1983); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA and SAA are part of the comprehensive scheme of federal regulation over locomotive safety and equipment and preempt all state law in those fields, just as they have since this Court definitively determined their preemptive scope in *Napier* and *Southern Ry. Co.* As explained below, these decisions have never been overruled by this Court or any act of Congress, and as such, the broad field preemptive effect of the BIA and SAA remains viable today.

B. Field Preemption Under The BIA And SAA Continues To Exist

Throughout their Petition, Petitioners assert that the BIA and SAA have been repealed by Congress and the need for the field preemption arising from those acts has been impliedly obviated. This premise is based on the faulty reasoning that Congress, by enacting the FRSA and by renumbering Title 49 in 1994, intended to do away with the BIA and SAA and their field preemptive effect. This assumption, however, is belied by the legislative history of these two Congressional actions and the "avalanche" of authority from around the nation upholding field preemption under these statutes.

The Supreme Court of California squarely and explicitly confronted the enactment of the FRSA and the 1994 "re-codification" of Title 49 in relation to the continued vitality of field preemption under the BIA. *Scheiding v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000). Despite Petitioners' insistence that these issues were not raised in *Scheiding*, California's high court clearly examined the applicable legislative history and cited with approval *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (holding that *Napier* and BIA field preemption exist without impairment after enactment of the FRSA). The *Scheiding* opinion succinctly and accurately sets forth the legislative history as follows:

"We also have evidence of legislative intent to this effect. As the court in *Consolidated Rail*, *supra*, 536 F.Supp. at pages 656-657, observed, **when Congress enacted the Federal Railroad Safety Act in 1970, it specifically identified the BIA as among the 'particular laws' governing railroad safety that 'have served well,' so well that the Committee on Interstate and Foreign Commerce reviewing the matter 'chose to continue them without change.'** (H.R. Rep. No. 91-1194, 2nd Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4105.) In discussing the role of the states in this area, the committee noted that '[a]t the present time where the Federal Government has authority [e.g., under the BIA], with respect to rail safety, it preempts the field.' (Id., 1970 U.S. Code Cong. & Admin. News at p. 4108.) **Additionally, when Congress recodified the BIA in 1994, the House report stated 'this bill makes no substantive change' and disclaimed any intent to 'impair the precedent value of earlier judicial decisions. . . .'** (H.R. Rep. No. 103-180, 1st Sess. (1993), reprinted in 1994 U.S. Code Cong. & Admin. News, p. 822; see *Finley v. United States* (1989) 490 U.S. 545, 554-555, 109 S.Ct. 2003, 104 L.Ed. 593.) **In light of this explicit statement, we may 'apply the presumption that Congress was aware of ... earlier judicial interpretations [including *Napier*] and, in effect, adopted them.** [Citations.]' *Keene*

> *Corp. v. United States* (1993) 508 U.S. 200, 212, 113 S.Ct. 2035, 124 L.Ed.2d 118)."

Scheiding, at 1000 (emphasis added). It is clear from this legislative history, as cited in *Scheiding*, that Congress clearly intended to retain the BIA **and** the judicial interpretations which provide its field preemptive effect. Further, Petitioners' claim that the California Supreme Court was not aware of these arguments when it decided *Scheiding* is demonstrably wrong.

The continuing vitality of field preemption under the BIA and SAA is also apparent from express regulations adopted pursuant to the Federal Railroad Safety Act of 1970 ("FRSA"). These regulations completely destroy Petitioners' argument that Congress intended to do away with BIA and SAA field preemption. Title 49 C.F.R. § 232.13(a) reiterates the FRSA's narrow express preemption language, found at 49 U.S.C. § 20106 (which Petitioners cite throughout their Petition as evidence of Congress' intent to wipe out BIA and SAA field preemption). Section 232.13(b), however, goes further as follows, to make clear that **in addition to and as a matter separate from** express preemption under the FRSA:

> Preemption should **also** be considered pursuant to the **Locomotive Boiler Inspection Act** (now codified at 49 U.S.C. 20701-20703), the **Safety Appliance Acts** (now codified at 49 U.S.C. 20301-20304), and the Commerce Clause **based on the relevant**

> **case law pertaining to preemption under those provisions.**

(Emphasis added). The regulation thus expressly clarifies that broad field preemption under the BIA and SAA, and as originally set forth by this Court in *Napier* and *Southern Ry. Co.*, is alive and well despite enactment of the FRSA or the "re-codification" of Title 49. The regulation cannot be read any other way, and its existence cannot be reconciled with Petitioners' position.

Finally, Petitioners' position is directly contrary to an "avalanche" of authority holding that the BIA and SAA must continue to be given a broad field preemptive effect. *Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389, 1403 (2007) (stating that its finding of preemption was "consistent with an avalanche of state and federal court decisions holding firm to the Napier principle that the BIA preempts state tort actions"); *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818, 822 (W. Va. 2003) ("an overwhelming body of case law" persuaded the court that Congress, through the BIA had occupied the field such that the plaintiff's asbestos claims were preempted and that any other decision was "blocked by an avalanche of adverse authority"), *cert. denied sub nom.*, *Abbott v. A-Best Products Company*, 549 U.S. 823 (2006). Support for this proposition is virtually universal. *See, e.g.*, *Scheiding*, *supra* (upholding the BIA's preemptive effect on state law tort claims by railroad workers and their spouses based upon alleged exposure to asbestos-containing products while on the

job and stating, "We conclude *Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action . . . "); *Carrillo*, *supra* (holding that the appellants' state law products liability and failure to warn claims were preempted by the SAA); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, *supra* (holding that *Napier* and BIA field preemption exist without impairment after enactment of the Federal Rail Safety Act of 1970); *In Re West Virginia Asbestos Litigation*, *supra*, (holding that state law tort claims against manufacturers of parts of railroad locomotives are preempted by federal law under the BIA); *Springston v. Consolidated Rail Corp*, *supra* (BIA preempted common law negligence claim for failure to install certain safety devices); *Seaman v. A.P. Green Industries, Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct., 2000) (holding that BIA preempts railroad workers' asbestos personal injury tort claims); *General Motors v. Kilgore*, 853 So.2d 171 (Ala. 2002) (holding that BIA preempts plaintiff's mesothelioma claims grounded in state tort law); *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004) (holding that BIA preempts railroad workers' state tort claims for asbestos related disease from exposure to defendant's locomotive component parts), *cert. denied*, 543 U.S. 1146 (2005); *Forrester v. American Dieselectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 1999) ("We think first that the force of the sweeping preemption rule under Napier remains unimpaired."); *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (holding that the BIA preempts state common law remedies against

railroad manufacturers for injuries allegedly caused by design defects in trains); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999) (holding that the BIA preempts common law remedies relating to locomotive equipment safety, including product defect and failure to warn claims), *cert. denied*, 528 U.S. 1004 (1999); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas,* 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster,* 205 F.3d 851, 860-61 (5th Cir. 2000); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So.2d 549, 553-555 (Ala. 2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana,* 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlong v. Union Pacific R. Co.*, 766 So.2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So.2d 556 (2001); *see also*, *Pennsylvania Ry. Co. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (via the SAA, the United States has exercised its exclusive power in the field, and thus "the states no more can supplement its requirements than they can annul them"); *Davis v. Manry*, 266 U.S. 401 (1925)

(reaffirming SAA field preemption); *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 60-61 (1934) ("So far as the safety equipment of such vehicles is concerned, [the Safety Appliance Act] operates to exclude state regulation whether consistent, complementary, additional or otherwise.").

Thus, the California Court of Appeal's Opinion is not in conflict with the decisions of this Court, but rather it is in accord with this Court's stance on BIA and SAA field preemption as first set forth in *Napier* and *Southern Ry. Co.* Moreover, the Opinion below is in line with the legislative history of the very Congressional acts upon which Petitioners rely, the applicable federal regulatory scheme, and essentially unanimous authority from around the country upholding BIA and SAA field preemption. As such, review is not warranted, and the Petition should be denied.

C. The Correct Preemption Analysis Was Applied Below

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2 quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively,

thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *See*, *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-369 (1986); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Petitioners assert that the decision below was contrary to this Court's decisions on federal preemption analysis. Pet. 14-16. In support of their assertion, Petitioners cite to an opinion by this Court which states, "***If the statute contains an express preemption clause***, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732 (1993) (emphasis added). The BIA and SAA do not contain express preemption clauses. As discussed above, those two statutes have long been interpreted as preempting the fields of locomotive parts and train safety appliances. Thus, the express preemption analysis that Petitioners argue should be applied here is inapposite.

Petitioners also assert that the California Court of Appeal failed to apply a presumption against

preemption. Such a presumption, however, is inapplicable when field preemption is at issue. Field preemption analysis is the reverse of express preemption analysis. This Court has unequivocally held that "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (discussing national and international maritime commerce). Here, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*; *see also*, *Carrillo v. ACF Industries, Inc.*, 20 Cal.4th 1158, 980 P.2d 386, (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000). Therefore, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. Further, in field preemption analysis a federal determination that regulation is unwarranted preempts state law even in the absence of an express regulation. As this Court held in *Napier*, 272 U.S. at 613, "the fact the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

In support of their position on preemption analysis, Petitioners cite to this Court's recent decision in *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187 (2009). That case, however, has no application here. *Wyeth* presented only the question of whether the Food and Drug Administration's drug labeling

decisions preempt state law products liability claims premised on a theory that different labeling was necessary. *Wyeth* was a **conflict** preemption case, *i.e.*, that the jury's determination of the necessary labeling requirements conflicted with the determination made by the FDA. Here, however, Petitioners' claims are barred by **field** preemption – a concept that was not even discussed by this Court in *Wyeth* because that defense had been abandoned. *Wyeth* at 1192 ("The (trial) court found no merit in . . . Wyeth's field pre-emption argument, which it has since abandoned").

Here, Congress and its commission (the FRA) have clearly exercised their exclusive jurisdiction over railroad equipment design through the BIA and SAA. As the courts below correctly ruled, the effect of these statutes is preemption of the field, which bars Petitioners' claims here. The conflict preemption reasoning in *Wyeth* and the express preemption reasoning in *CSX Transportation* are inapplicable in this case, and they do not change the appropriate field preemption analysis. Thus, the California Court of Appeal's opinion in this case does not conflict with the decisions of this Court, and the Petition should be denied.

II. THERE IS NO CONFLICT AMONG THE STATES AND CIRCUITS - THE ISSUE IS SETTLED

A. Four State Supreme Courts And Five Federal Circuit Courts Have Upheld BIA And SAA Field Preemption

Petitioners assert that only two federal circuits and two state supreme courts have ruled in favor of field preemption under the BIA and SAA. Pet. at 23. This is simply not accurate. Four state supreme courts have issued opinions directly contrary to Petitioners' arguments here: **(1) California** – *Scheiding v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S. Ct. 383 (2000), and *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000); **(2) Alabama** – *General Motors v. Kilgore*, 853 So.2d 171 (Ala. 2002); **(3) Ohio** – *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); and **(4) West Virginia** – *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom., Abbott v. A-Best Products Company*, 549 U.S. 823 (2006). These four states are joined by five federal circuits to hold the same: **(1) Second** – *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); **(2) Fifth** – *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-861 (5th Cir. 2000); **(3) Sixth** – *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir.

1997), *cert. denied*, 523 U.S. 1094 (1998); **(4) Eighth** – *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); and **(5) Ninth** – *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997); *Forrester v. American Dieselectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 1999). The field preemptive effect of the BIA and SAA was also upheld by the federal district court in *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982). As discussed below, that decision was summarily affirmed by the Third Circuit, *Consolidated Rail*, 696 F.2d 981 (3d Cir. 1982), as well as this Court, *Consolidated Rail*, 461 U.S. 912 (1983). Moreover, the two "conflicting" decisions cited by Petitioners are no longer controlling, misconstrued, and contrary to the great weight of authority, as discussed below.

B. *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Comm'n* Has Been Impliedly Overruled By This Court

Petitioners rely heavily on the Pennsylvania Supreme Court's decision in *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Comm'n*, 413 A.2d 1037 (Pa. 1980). However, this case has been impliedly overruled. Two years after it was decided, the Federal District Court for the Eastern District of Pennsylvania decided *Consolidated Rail*, *supra*, and

dealt expressly, and disagreed, with the earlier decided *Norfolk & Western* case:

> I, however, disagree with the states' argument (relying on *Norfolk & Western*) for two reasons. First, the legislative history of the Railroad Safety Act shows that Congress intended no change to the Locomotive Inspection Act. Second, elimination of the total-preemption test for locomotive equipment runs contrary to the purpose of the Railroad Safety Act.
>
> In passing the Railroad Safety Act, Congress could have repealed the Locomotive Inspection Act, or recodified or subsumed it within the comprehensive Railroad Safety Act. Instead, Congress concluded that the Locomotive Inspection Act was working well, and specifically determined to keep it independently in force "without change." These decisions negate implied modification of any part of the Locomotive Inspection Act, including its total occupation of the locomotive-equipment field.

Consolidated Rail, 536 F. Supp. at 656. The federal district court's decision in *Consolidated Rail* was appealed to this Court, was summarily affirmed, and thereby became the law of the land. The decision was first affirmed by the Third Circuit Court of Appeals. *Consolidated Rail*, 696 F.2d 981 (3d Cir. 1982). This Court then granted certiorari and likewise summarily affirmed. *Consolidated Rail*, 461 U.S. 912 (1983). The summary affirmance by the U.S. Supreme Court

constitutes binding precedent on all lower courts, state and federal. *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975) ("lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not"); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L.Ed.2d 199 (1977) (Summary affirmance "should . . . be understood as . . . applying principles established by prior decisions to the particular facts involved."). Indeed, the Pennsylvania Supreme Court recognizes that "the decisions of the United States Supreme Court interpreting federal statutes are binding on this Court." *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 33, n.15 (Pa. 2006); *see also*, *Purple Orchid, Inc. v. Pa. State Police*, 813 A.2d 801, 806 (Pa. 2002). There is simply no question but that the issue of the field preemptive effect to be given the BIA and SAA, clearly federal statutes, by reason of the Supremacy Clause of the U.S. Constitution is one of federal law. Thus, *Consolidated Rail* impliedly overruled *Norfolk & Western* on the very grounds for which Petitioners cite it.[2]

The validity of *Norfolk & Western* is being questioned in two pending Pennsylvania state court cases. *See*, *Harris v. A.W. Chesterton, Inc., et al.*, No. 000783, Ct. of Common Pleas, Philadelphia County,

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[2] Petitioners claim that there is more than one ground for affirmance in *Consolidated Rail*. Pet. at 31, n.6. However, the district court's opinion clearly rests upon the proposition that BIA and SAA field preemption survive the enaction of the FRSA.

Civil Div., July Term 2005; and *Atwell v. John Crane, Inc.*, No. 1366, Ct. of Common Pleas, Philadelphia County, Civil Div., May Term 2004. *Harris* is currently on appeal and awaiting decision in the Superior Court of Pennsylvania. *See, Harris v. A.W. Chesterton, Inc., et al.*, No. 3505 EDA 2008 (Pa. Super.). *Atwell* was recently decided by the Superior Court of Pennsylvania, *see, Atwell v. John Crane, Inc.*, ___ A.2d ___, 2009 WL 4844374 (Pa. Super.), 2009 Pa. Super. 246 (Dec. 17, 2009), and a request for review by the Supreme Court of Pennsylvania is forthcoming. The final decisions in those cases may well recognize the downfall of *Norfolk & Western* and/or **expressly** overrule it. Indeed, the Superior Court of Pennsylvania in *Atwell* expressly encourages its Supreme Court to revisit the issue. *Atwell*, at *5, n.9 ("The decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it."). An appeal is also pending before the Third Circuit Court of Appeals in an asbestos case in which summary judgment was granted on BIA/SAA field preemption grounds. *See, Kurns v. A.W. Chesterton, et al.*, Slip Copy, 2009 WL 249769 (E.D. Pa.). The Third Circuit's decision in *Kurns* will likely solidify its earlier summary affirmance of *Consolidated Rail* and clarify that decision's effect on *Norfolk & Western*. Therefore, review by this Court is premature, as the Pennsylvania appellate courts and/or the Third Circuit Court of Appeals may well eliminate any argument

that *Norfolk & Western* creates a conflict among the decisions of the states and/or federal circuits.

C. *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* Is Not A BIA/SAA Field Preemption Case At All

Petitioners also claim that *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 484 P.2d 1146 (Wash. 1971), supports their position. It does not. In *Chicago Milwaukee*, a railroad company was convicted of violating a state criminal statute requiring trains operating in proximity to brush or grass to be equipped with spark arresters. On appeal, the railroad company argued that the state statute was preempted by the BIA. The prosecution, in turn, argued that the BIA was designed to protect the safety of persons, not property and that preemption was not viable where the Interstate Commerce Commission had yet to regulate specifically as to a part or appurtenance of a locomotive. *Chicago Milwaukee*, 484 P.2d at 1148.

The Court, in holding against preemption, rested its decision largely on the fact that "states, in the exercise of their police power, may prescribe regulations applicable to interstate commerce for the protection of their citizens' property." *Id.* at 1149 (emphasis added). Such reasoning makes clear that despite its passing reference to the BIA and SAA, *Chicago Milwaukee* was decided using express preemption analysis under the FRSA. This is evident because of

the Court's reliance on the fact that preventing forest fires is an "essentially local safety hazard." This reasoning is taken directly from the language of FRSA and its narrow express preemption clause, and is irrelevant to the BIA and SAA's broad field preemption. Indeed, *Chicago Milwaukee* has been expressly treated as an FRSA case. *See, e.g., Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Comm'n*, 453 F. Supp. 920, 926 (N.D. Ill. 1977) (explaining that in *Chicago Milwaukee*, "the Supreme Court of Washington found that the state's regulation concerning fires alongside railroad tracks was not preempted **by the Railroad Safety Act**." (emphasis added)).

Chicago Milwaukee, despite its confusing references to the BIA, was clearly decided as an express preemption case under FRSA and cannot be legitimately read as a BIA preemption case. Thus, the FRSA express preemption analysis set forth in *Chicago Milwaukee* has no bearing on the issues before this Court. In any event, to the extent *Chicago Milwaukee* addresses the BIA, it is no longer viable precedent at all, as it too was decided before *Consolidated Rail*, *supra*. It is therefore no surprise that both *Norfolk & Western* and *Chicago Milwaukee* have been described as "unpersuasive and contrary to federal policy." *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 576, n.7 (5th Cir. 1987).

In light of the above, Petitioners' argument that certiorari review is justified because the decision

below by the California Court of Appeal conflicts with *Norfolk & Western* and *Chicago Milwaukee* is without merit. This Court granted certiorari in and summarily affirmed *Consolidated Rail* in 1983, years **after** *Norfolk & Western* and *Chicago Milwaukee* were decided. The decision below was not from California's highest court, unlike *Scheiding* and *Carrillo* which were. This Court denied certiorari in both *Scheiding* and *Carrillo* **after** *Norfolk & Western* and *Chicago Milwaukee* were decided. *See*, *Scheiding*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000); and *Carrillo*, 980 P.2d 386 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000). In fact, **after** *Norfolk & Western* and *Chicago Milwaukee*, this Court denied certiorari on this issue five more times. *See*, *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom.*, *Abbott v. A-Best Products Company*, 549 U.S. 823 (2006); *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *In Re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). In addition to being after *Norfolk & Western* and *Chicago Milwaukee*, each of the cases in which

this Court denied certiorari were **after** the 1994 "re-codification" upon which Petitioners rely. The time to review the issue via certiorari on the grounds that conflicting decisions exist will arise only if the Pennsylvania Supreme Court reaffirms its holding in *Norfolk & Western*.

By denying certiorari in the above-cited cases, this Court has rejected the opportunity to revisit the scope of the BIA/SAA seven times in the last twelve years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and *Southern Ry. Co. See*, Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari."

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those cases. Instead, as discussed above, an even greater litany of cases has now agreed that Petitioners' claims fall within the field preempted by the BIA and SAA. Accordingly, as this Court found in *Napier* and *Southern Ry. Co.* nearly a century ago, the BIA and SAA preempt the entire field of locomotive equipment, design, construction, materials, parts and appurtenances, as well as the field of train safety appliances. Therefore, this Petition should be denied.

III. FIELD PREEMPTION UNDER THE BIA AND SAA DOES NOT UNDERMINE RAILROAD SAFETY

Petitioners assert that the field preemptive effect given the BIA and SAA undermines railroad safety, and that citizens may be left without recourse if this preemption is upheld. However, as the California Supreme Court clearly explained in *Scheiding*, the BIA actually broadens the opportunity for recovery under FELA, which provides ample recourse for railroad employees:

> [L]ike the Safety Appliance Acts at issue in *Carrillo,* the BIA "contains no evidence Congress assumed or intended state remedies for design defects would be preserved. Given the goal of national uniformity, allowing such claims would substantially impair its function."
>
> Drawing on *Medtronic* and *Silkwood*, the Court of Appeal in *Viad*, reached a contrary conclusion by defining the field preempted by the BIA to exclude plaintiffs' state tort actions. It noted that "when the BIA was enacted, a railroad employee would have had no right of action against the manufacturer." The court reasoned that since "[t]he doctrine of strict liability of a manufacturer was not established until much later", Congress could not have intended to preempt such actions. But this reasoning proves too much: Equally logically, Congress could not have intended to preserve that which did not exist.

> Furthermore, the BIA was enacted as an amendment to the Federal Employers' Liability Act (45 U.S.C. § 51 et seq., FELA), which significantly expanded the ability of railroad workers to seek recourse for on-the-job injuries and has been broadly interpreted. ("One of the primary purposes of FELA was to eliminate defenses to tort liability and to facilitate recovery. [Citation.]".) Having enlarged the basis for recovery under federal law, Congress reasonably could have intended to restrict it under state law.
>
> Moreover, unlike the situation in *Silkwood,* the field occupied by the BIA must necessarily extend to state law tort recovery. That is, the BIA cannot remove "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material. Any other result would place regulation of these requirements in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity.

Scheiding, 993 P.2d at 1001-1002 (citations omitted); *see also*, *Carrillo*, 980 P.2d 392-93.

Petitioners even go a step further and claim that field preemption under these acts "actually encourages manufacturers to market defective products."

Pet. at 33. Such an assertion is completely without merit. As the Ninth Circuit states in *Law*, the "distinction [between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-912. *Accord, Springston*, 130 F.3d at 244-245 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d, 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement . . . "). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier,* 272 U.S. at 611. Since Petitioner's claims fall within the field, they are preempted. *Accord, Law*, 114 F.3d at 911-912.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is

clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[3]

Moreover, because the preemptive field, namely the "design, the construction, and the material of every part of the locomotive," is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*,

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[3] *Cf.*, *Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdictions would "undoubtedly create an additional deterrent to the manufacture of unsafe component" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

180 F.3d at 462; *Law*, 114 F.3d at 911-912. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

"Apart from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. . . . " *Id.* at 910-911. The goal of the BIA and SAA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devises on locomotives crossing state lines. To facilitate this goal, the BIA and SAA applies to manufacturers of locomotives and their component parts, train safety appliances, as well as to railroad carriers. Petitioners' state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and train safety appliances. As such, those claims are preempted, and this Petition should be denied.

CONCLUSION

Based on the above arguments and authorities, Respondent, Griffin Wheel Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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